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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1416

JOHN D. RANDALL,
Petitioner

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Iowa is reported as *The Committee on Professional Ethics and Conduct of the Iowa State Bar Association* v. *Randall*, 285 N.W.2d 161 (Iowa 1979).

JURISDICTION

The final order of the Iowa Supreme Court disbarring the Petitioner from the practice of law in Iowa was entered November 14, 1979. Rehearing was denied on December 13,

1979. Petitioner, in the jurisdictional statement of his petition for writ of certiorari, sets forth no grounds on which the jurisdiction of this Court is predicated and asserts only that jurisdiction is conferred in some unspecified manner by Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner was disbarred for having violated *Iowa Code of Professional Responsibility for Lawyers*, Disciplinary Rules 5-101(A) and 5-104(A), and Ethical Consideration 5-5, as follows:

Iowa Code of Professional Responsibility for Lawyers (1973):

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

EC 5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

Petitioner asserts that the case involves due process of law as provided in Amendment 14, United States Constitution, as follows:

> ***[N]or shall any State deprive any person of life, liberty, or property, without due process of law;***

QUESTIONS PRESENTED

(1) Were the proceedings before the Grievance Commission and the Iowa Supreme Court conducted in accordance with the principles of due process and, in any event, did Petitioner waive his due process argument by presenting the Iowa Supreme Court only the issue "Should John Randall be Disbarred or Suspended?"

(2) Was the conduct of the Petitioner such that any reasonable lawyer would know it was wrong and subject him to discipline and is the language of the ethical considerations and disciplinary rules under which Petitioner was charged sufficiently clear so as to give adequate notice of conduct that will be subject to disciplinary action?

STATEMENT OF THE CASE

John D. Randall, the Petitioner, was an attorney, business associate, and friend of Lovell Myers. These various relationships had their inception sometime in the early 1940's and continued until Myers' death in 1976.

On February 17, 1973, an individual known as Gilbert Morningstar accused Lovell Myers and Petitioner of forging a deed for approximately eighty acres of land from Gilbert Morningstar and his wife to a corporation, Myers Farms, Inc., wholly owned by Petitioner and Lovell Myers. On the same day, Lovell Myers admitted the forging and the Petitioner and Lovell Myers, on behalf of the corporation, quit claimed this eighty acres of land back to Gilbert Morningstar. During discovery depositions in the will contest filed by Lovell Myers' daughter and a civil suit commenced by Gilbert Morningstar against Myers Farms, Inc., the Petitioner alleged that this eighty acres was the property of Myers Farms, Inc., and, further, that Lovell Myers and Gilbert Morningstar had, over the years, by a common scheme misappropriated corporate assets. Despite the conflict which arose between Petitioner's interests and those interests of Lovell Myers when Petitioner believed that Myers and Gilbert Morningstar had conspired against him to defeat his ownership of the eighty acres, Petitioner continued to act as attorney for both Myers and the corporation.

Twenty-five days after the accusation by Gilbert Morningstar, on March 14, 1973, the Petitioner drafted a Last Will and Testament for Lovell Myers, which was shortly thereafter executed by Myers, leaving all of Myers' property (which had a gross value of approximately two million dollars) to Petitioner. Lovell Myers' daughter, Marie Jensen, and her family with whom Myers had maintained a clsoe family relationship over the years, were not mentioned in the will. Upon the offering by Petitioner of the will for probate, Lovell Myers' daughter brought suit to set aside the will. This will contest was settled for approximately one and one-half million dollars.

The Petitioner's conduct was originally brought to the attention of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association by a letter from Lovell Myers' daughter, Marie Jensen. The Committee then obtained copies of the discovery depositions, including the deposition of Petitioner, taken in the will contest case Marie Jensen had filed. The Petitioner's testimony was such that the Committee then initiated, upon its own volition pursuant to Court Rule 118.2, a further inquiry into Petitioner's conduct as it involved Lovell Myers.

The Lawyer Disciplinary Procedure of the Iowa Supreme Court is separate and distinct from the Iowa State Bar Association. Pursuant to the Iowa Supreme Court Rule 118, the Committee on Professional Ethics and Conduct first acts (in substance) as a grand jury to determine if charges should be brought. The Ethics Committee is not an adjudicatory tribunal and matters before it are not adversary. Meetings of the Ethics Committee are held to consider the investigation of complaints against lawyers and may or may not involve a personal appearance by the lawyer concerned.

If, after investigation, the Committee on Professional Ethics and Conduct brings charges against an attorney, the Committee prosecutes the matter before a division of the Grievance Commission of the Iowa Supreme Court. The Grievance Commission is a "separate court" established by the Iowa Supreme Court to hear lawyer disciplinary cases. The Grievance Commission is an entity completely separate from the Ethics Committee. A division of the Grievance Commission consists of five lawyers who hear the evidence presented in a trial setting and thereafter make findings of fact, conclusions of law, and recommend appropriate action to the Supreme Court of Iowa. Any recommendation for disciplinary action then stands for final disposition in the Supreme Court. Only the Supreme Court may take action against a lawyer. If the lawyer files exceptions to the findings of facts and recommendations of the Grievance Com-

mission, the Supreme Court reviews the record made before the Commission de novo (as provided in Court Rule 118.11) and makes its own findings of fact upon which it takes appropriate action.

The Petitioner, John Randall, was found guilty by the Iowa Supreme Court of a flagrant and inexcusable conflict in violation of DRs 5-101(A) and 5-104(A), as well as EC 5-5. The Petitioner had been notified, in writing, that a complaint was to be filed against him by the Committee on Professional Ethics and Conduct. He was given the opportunity, which he accepted, to discuss the matter further with a subcommittee of the Ethics Committee in Des Moines. At the meeting, the Petitioner stated that an adequate investigation had not been undertaken and that he had material evidence in his possession that would dispose of any allegations of misconduct against him. He requested that the Committee send someone to Cedar Rapids to view the evidence. Lee Gaudineer, known to Petitioner as counsel and prosecutor for the Ethics Committee, went to Cedar Rapids, viewed Petitioner's files, and listened to explanations made by Petitioner and his associate. Mr. Gaudineer also interviewed other Cedar Rapids area attorneys as requested by Petitioner.

This further investigation at Petitioner's request provided the Committee with no new information. The investigation requested by Petitioner resulted only in a delay in the filing of the complaint.

Once the Committee on Professional Ethics and Conduct files a complaint against a lawyer, that lawyer is always provided with an impartial hearing with all the requirements of due process. As provided in Court Rule 118, this hearing is before the Grievance Commission of the Iowa Supreme Court. Petitioner was provided a hearing before the first division of the Grievance Commission.

Petitioner received a very fair trial. None of his constitutional rights were violated. The Petitioner attempted to delay the proceedings by filing many interrogatories and requesting to take depositions of the members of the Ethics Committee and their counsel. The Committee resisted these requests. Many of Petitioner's requests for discovery were granted. Discovery that was not permitted consisted of depositions Petitioner sought to take of the members of the Committee and their counsel. The Grievance Commission, by the president of the first division, held the discovery depositions improper. The Iowa Supreme Court granted Petitioner's request to appeal this ruling to the court before final judgment. The Court, upon hearing this appeal, sustained each of the rulings of the president of the first division of the Grievance Commission. The Petitioner did not include this ruling as any alleged error in his final appeal.

The Supreme Court of Iowa considered another interim application of Petitioner's. It is customary for individual members of the Grievance Commission division to ask questions of witnesses if they desire. Upon members doing this, Petitioner challenged the division. The division immediately recessed to permit him to carry the challenge to the Iowa Supreme Court. The challenge was denied at that time but leave was granted to renew it any any subsequent time. Petitioner did not renew the challenge or allege this as error in his appeal.

The Grievance Commission filed findings of fact, conclusions of law and recommendations for disciplinary action by the Iowa Supreme Court. On March 16, 1979, Petitioner filed a notice of appeal to the Supreme Court of Iowa. In his brief on appeal, Petitioner raised only one issue: "Should John Randall be Disbarred or Suspended?"

On November 14, 1979, the Supreme Court of Iowa entered an opinion and order revoking Petitioner's license to practice law in the state of Iowa, finding Petitioner to have violated DRs 5-101(A) and 5-104(A), and EC 5-5. Rehearing was denied on December 13, 1979.

ARGUMENT

I

The Proceedings Before the Grievance Commission and the Iowa Supreme Court Were Conducted in Accordance With the Principles of Due Process and, in Any Event, Petitioner Waived His Due Process Argument by Presenting the Iowa Supreme Court Only the Issue "Should John Randall Be Disbarred or Suspended?"

Procedural due process requires the protections of at least notice and the opportunity to be heard, and potentially requires a neutral decision maker, the opportunity to present evidence or witnesses, the opportunity to confront the witness against the individual, and the right to counsel. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). As the facts in the Statement of the Case detailing Petitioner's disciplinary proceeding show, all of these requirements of due process were met during that proceeding.

Petitioner had notice of the disciplinary action which was to commence with regard to his conduct in drawing the Myers will and in his continuing to represent Lovell Myers despite the conflict of interest present. This was all detailed in the Complaint against the Respondent filed by the Ethics Committee with the Grievance Commission. Petitioner had a hearing before an impartial decision maker, the Grievance Commission of the Iowa Supreme Court. Petitioner had the opportunity to present evidence and witnesses, as well as to cross examine witnesses of the Ethics Committee. Petitioner was represented by counsel. Frankly, the proceeding met the requirements of procedural due process of a regular Court trial and easily those set forth in *Goldberg, supra.*

Petitioner was informed a complaint was to be filed against him by the Committee on Professional Ethics and Conduct. He asserts he was then "subjected to investigation." In fact, Petitioner requested this investigation.

Petitioner asserts that he was denied discovery in violation of Court Rule 118.6. As the facts set forth in the Statement of the Case show, Petitioner was granted the discovery he requested which was proper under Court Rule 118.6. The discovery denied was considered improper under Court Rule 118.6 by the president of the Grievance Commission division and the Supreme Court of Iowa affirmed that decision in a interim ruling.

Petitioner asserts prejudice and a violation of due process because the Ethics Committee failed to afford a speedy disposition of the matter. Any delay in filing the complaint was caused by Petitioner. Petitioner requested the right to appear before a subcommittee of the Ethics Committee. He then requested additional time-consuming investigation. After that investigation was completed, the Committee again considered the matter and again informed Petitioner a complaint would be filed. The complaint was then filed.

Petitioner asserts that he did not have fair notice of the charges brought against him. The complaint filed by the Ethics Committee clearly set forth the charges brought against Petitioner and the conduct upon which those charges were based. It was not amended before or during trial. The complaint charged Petitioner with numerous violations of the *Iowa Code of Professional Responsibility* by his conduct in naming himself sole beneficiary of Lovell Myers, and by his continued representation of Lovell Myers despite the conflict of interest that was present. The conduct set forth in the complaint was the conduct for which Petitioner was disbarred by the Iowa Supreme Court. Petitioner had notice of this complaint and more than adequate time to defend against the charges contained therein. Petitioner's assertion of no fair notice is without merit as is his assertion that new charges were identified before the Grievance Commission.

The Grievance Commission provided Petitioner a full and fair hearing in accordance with due process. See Statement of the Case. Any allegations otherwise are totally unfounded. The

Petitioner did not challenge the conduct of his trial before the Iowa Supreme Court.

On appeal to the Supreme Court of Iowa, Petitioner's brief raised one issue: "Should John Randall be Disbarred or Suspended?" Contrary to Petitioner's assertion, the brief raised no due process issue and contained no argument of due process violations. The Supreme Court of Iowa ruled that Petitioner waived consideration of his due process argument, if one he had, by failing to properly present it to the Court. *Committee on Professional Ethics and Conduct of the Iowa State Bar Association* v. *Randall*, 285 N.W.2d 161, 165 (1979).

Petitioner has relied on 28 U.S.C. §1257(3) to confer jurisdiction on this Court. That statute requires that the Petitioner must not only "specially set up" or claim a constitutional right, title, privilege or immunity, but he must do so "at the proper time and in the proper manner." *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181 (1919); *Mutual Life Insurance Co.* v. *McGrew*, 188 U.S. 291, 308 (1903). This principle is not discretionary; it is jurisdictional. *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968) (Harlan, J. dissenting). For the Petitioner's allegations to be effectively maintained, they must have been properly presented to or passed upon by the state court. The Supreme Court has consistently refused to decide issues presented to it for the first time. *Tacon* v. *Arizona*, 410 U.S. 351 (1973) (As the constitutional questions presented in the petition for certiorari were not raised below nor passed upon by the State's highest court, the writ of certiorari was dismissed as improvidently granted where the only issue actually litigated did not alone justify exercise of certiorari jurisdiction); *Nelson* v. *County of Los Angeles*, 362 U.S. 1, 9 (1960); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

Petitioner was afforded all the safeguards of procedural due process and, in any event, he failed to properly present any constitutional issues to the Supreme Court of Iowa. He cannot now present them to the United States Supreme Court.

Respondent submits that this Court is without jurisdiction to review the determination of the Supreme Court of Iowa as no constitutional question was properly presented to or passed upon by that Court. *See, Wolfe* v. *North Carolina*, 364 U.S. 177, 194-196 (1960); *Bailey* v. *Anderson*, 326 U.S. 203, 206-07 (1945). This case clearly falls within a class of cases aptly described by this Court in *Chicago, Indianapolis & Louisville Railway Co.* v. *McGuire*, 196 U.S. 128, 133 (1905);

> "This case is the not infrequent one of an attempt to clutch at the jurisdiction of this Court as an afterthought, when all other resources of litigation have been exhausted."

It is apparent, therefore, that the lack of any constitutional question negates any inference of jurisdiction under 28 U.S.C. §1257(3) and that the Petition must be denied.

II

The Conduct of the Petitioner Was Such That Any Reasonable Lawyer Would Know It Was Wrong and Subject Him to Discipline; In Any Event, the Language of the Ethical Considerations and Disciplinary Rules Under Which Petitioner Was Charged is Sufficiently Clear So As to Give Adequate Notice of Conduct That Will be Subject to Disciplinary Action.

Petitioner asserts that he has been denied due process in his disciplinary proceeding because the language of the Ethical Considerations and Disciplinary Rules of the *Iowa Code of Professional Responsibility for Lawyers* is vague and standardless and therefore unconstitutional. His argument in his regard is confined to EC 5-5. However, his violation of DRs 5-101(A) and 5-104(A), alone, are sufficient to sustain the judgment of the Iowa Supreme Court. They are not vague. Petitioner, in his application, would ask this Court to ignore this very obvious fact.

In making such assertion, the Petitioner has assumed a very heavy burden of proof in overcoming the presumption of constitutionality and negating every conceivable interpretation favoring constitutionality. *Fleming* v. *Nestor*, 363 U.S. 603, 617 (1960); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973); *Moorman Mfg. Co.* v. *Bair*, 254 N.W.2d 737 (Iowa 1977), aff'd 98 S. Ct. 478 (1978).

The Petitioner has not cited any authorities holding that any part of the *Code of Professional Responsibility for Lawyers* has ever been found to be unconstitutional for being vague and indefinite. To the Respondent's knowledge, few cases have ever really addressed the constitutionality of the Canons or the Code of Professional Ethics.

In *Complaint of Rook*, 556 P.2d 1351, 276 Or. 695 (1976), an allegation of vagueness was made against DR 1-102(1) (a lawyer should not violate a disciplinary rule) and DR 1-102(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice). A district attorney had been accused of refusing to plea bargain with criminal defendants on the same basis as previously offered to other criminal defendants as long as such persons were represented by either of their attorneys. The court disposed of this issue as follows: (at 1357)

> "As for the contention by the accused that the terms of DR 1-102(1) and (5) are unconstitutionally vague, we believe that as standards of professional conduct they are sufficiently definite for the purpose of a professional disciplinary proceeding. See *Board of Medical Examiners* v. *Mintz*, 233 Or. 441, 448, 378 P.2d 945 (1963). We have previously held that such a proceeding is not a criminal proceeding and that the technicalities of criminal law, which are properly invoked to safeguard the liberty of citizens, are not necessarily relevant in the investigation of unethical conduct by an attorney. See *In Re Gronnert*, 242 Or. 233, 236, 391 P.2d 772 (1965). See also, *In Re Laske*, 269 Or. 146, 158, 523 P.2d 1262 (1974). This is particularly

> true where, as in this case, no First Amendment freedoms have been violated. Cf. *State* v. *Nelson*, 210 Kan. 637, 504 P.2d 211 (1972)."

In the case of *State* v. *Nelson*, 211 Kan. 637, 504 P.2d 211 (1972), an attorney was charged with violating DR 1-102(A)(5) in connection with certain statements he made to the newspapers covering a law suit in which his client lost. The statements were critical of the courts in general. The attorney asserted that the word "prejudicial" as it appears in DR 1-102(A)(5) was unconstitutionally vague. The Court stated as follows:

> "... Respondent's position is unsupported in both instances. The word 'prejudicial' is universally found throughout the legal and judicial system. Specific definitions are found in any dictionary." 504 P.2d at 214.

The attorney also argued that the Section created impermisible and chilling effects on his First Amendment rights. The Court stated:

> "... [An examination of decisions on the point (12 A.L.R.3d, *Annotation*, p. 1408)] reveals the concensus to be an attorney's right to free speech is tempered by his obligation to both the courts and the bar, an obligation to which ordinary citizens are not held. In the case of *In Re Sawyer*, 360 U.S. 322, 79 S. Ct. 1376, 3 L.Ed.2d 1473, the last case in which the United States Supreme Court addressed itself to the subject, it appears that at least five Justices agreed that the right to free speech may not be invoked to protect an attorney against discipline for unethical conduct." 504 P.2d at 214.

The Petitioner has cited the case of *In Re Ruffalo*, 390 U.S. 544 (1968) for the authority that an attorney in an attorney disciplinary hearing must be afforded the rights of due process and that such proceedings are quasi-criminal. In that case, the charges for which the attorney was disbarred were not filed until

the third day of hearings, after the attorney had testified. Petitioner herein cannot in good faith assert that he did not have notice of the charges for which he was disbarred. All charges brought against Petitioner were contained in the Complaint and filed prior to the hearing of the Grievance Commission. Petitioner was given adequate time to prepare for the hearing, with knowledge of those charges.

This Court in the *Ruffalo* case made certain statements appropos to the case at bar wherein it stated:

> "A relevant inquiry in appraising the decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed. The Court of Appeals, Sixth Circuit, have provided petitioner and other members of its bar with a generaal standard for disbarment:
>
> > 'When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be forthwith suspended from practice before the court and notice of his suspension will be mailed to him, and unless he shows good cause to the contrary within 40 days thereafter, he will be further suspended or disbarred from practice before the court. (Rule 6(3), Court of Appeals for the Sixth Circuit)'
>
> Even when a disbarment standard is unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as malum in se. It also includes conduct for which all responsible attorneys would recognize as improper for a member of the profession." 390 U.S. at 554-555.

In 1978 this Court examined the constitutionality of the prohibition against solicitation by attorneys. In *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 98 S. Ct. 1912 (1978), this Court sustained the prohibition wherein an in-person solicitation was made by an attorney who was doing so for profit. In the case of *In Re Primus*, 436 U.S. 412, 98 S. Ct. 1893 (1978), this Court had before it a violation of DR 2-103(D)(5)(a) and (c) and DR 2-104(A)(5) of the rules of the Supreme Court of South Carolina. An attorney for the ACLU had been found guilty of soliciting a client in violation of such rules where she notified in writing a prospective client of a class action and thereafter represented her in the case. The attorney challenged the constitutionality of such disciplinary rules as abridging her First Amendment freedoms. In passing on the constitutionality of such disciplinary rules, this Court made certain statements appropos to the case at bar:

> " The States enjoy broad power to regulate 'the practice of professions within their boundaries,' and '[t]he interest of the state in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'' *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792, 95 S. Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). For example, we decided today in *Ohralik* v. *Ohio State Bar Association*, _____ U.S. _____, 98 S. Ct. 1912, 55 L.Ed. 2d _____, that the States may vindicate legitimate regulatory interests through proscription, in certain circumstances, of in-person solicitation by lawyers who seek to communicate purely commercial offers of legal assistance to laypersons." 98 S. Ct. at 1899.

This Court further stated:

> "... Without denying the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that

potentially are present in solicitation of prospective clients by lawyers, this Court has required that 'broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of 'the value of associational freedoms.' . . ." citing *Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217 (1967). 98 S. Ct. at 1902.

In *Primus*, this Court found that for the ACLU, like the NAACP, litigation is not a technique of resolving private differences, but a form of political expression and political association. This Court then distinguished solicitation for profit from solicitation on behalf of a non-profit corporation and found that the attorney could not be disciplined on the facts of the case. The rules proscribing solicitation for pecuniary gain were sustained.

Again, we saw this Court upholding, not overturning, disciplinary rules and, in doing so, recognizing that the states have 'broad power to regulate the practice of professions within their boundaries.' And, more specifically, this Court refused to deny to the states the power to correct the substantive evils of undue influence, overreaching, misrepresentation, etc. These are exactly the kinds of 'substantive evils' at issue in this case and the Petitioner can cite no authority for his contrary assertions.

It is submitted that the only vagueness in this matter is how Petitioner could believe his conduct to be proper under any definition of any word or standard involved in the proceeding. In essence, the Petitioner is saying he did not understand that adherance to the principles of "common honesty" as well as the *Iowa Code of Professional Responsibility for Lawyers* prohibited his conduct. The Petitioner seeks to have the Court judge his conduct by some non-existent standard. In arguing the denial of due process, he apparently wished to have the Iowa court read the *Code of Professional Responsibility* in some

strict, legalistic and technical manner. This the Court has said it will not do. *Committee* v. *Crary*, 245 N.W.2d 298, 307 (Iowa 1976).

The Supreme Court of Iowa has the inherent power to discipline those lawyers whose conduct is found to be unprofessional. *Theard* v. *United States*, 354 U.S. 278 (1957); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978). One precondition that may be constitutionally imposed upon a member of the bar is that he demonstrate "good moral character." *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957); *Schware* v. *Board of Examiners of New Mexico*, 353 U.S. 232 (1957). Iowa has long recognized that lawyers must demonstrate good moral character as a requisite for continuing the practice of law. *State* v. *Rohrig*, 159 Iowa 725, 139 N.W. 908 (1913). It is respectfully submitted that the *Iowa Code of Professional Responsibility for Lawyers* is sufficiently clear by which to judge an attorney's conduct or fitness and that no lawyer should have any difficulty in concluding that Petitioner's conduct was improper and reflects a lack of fitness to practice law.

The point to be made is that while the Disciplinary Rules and Ethical Considerations are sometimes framed in broad terms, it is necessary. The *Code of Professional Responsibility for Lawyers* consists of nine Canons or ethical precepts. In the Ethical Considerations and Disciplinary Rules, the guide is found as to how not to violate the Canons. The Code of Professional Responsibility is read as a whole and applied to a given situation. Not every possible situation can be specifically proscribed, but these are regulatory matters and not criminal statutes. When a reasonable attorney, knowing of these high standards, would know that his conduct was unethical, there is no problem of vagueness. *In Re Primus*, 436 U.S. 412 (1978); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978). It is respectfully submitted that such standards are more than adequate to give notice to the attorney of proscribed conduct and as long as he is not denied any procedural due process which

materially prejudices his right to a fair hearing, he cannot be heard to complain that the *Code of Professional Responsibility for Lawyers* is unconstitutional for vagueness.

Petitioner asserts that he was disbarred for conduct that was not a disciplinary offense when the Myers will was drafted in 1973. Petitioner asserts that Ethical Considerations were not then mandatory, but merely aspirational and therefore not a basis for disciplinary action. In urging such proposition he is, in effect, asking the Court to overrule *Matter of Frerichs,* 238 N.W.2d 764 (Iowa 1976) and seems to be saying that the Iowa court recognized in amending EC 5-5 on December 16, 1977, that Ethical Considerations should not form the basis for disciplinary action. (Petitioner also forgets that he was disbarred, not only for violating EC 5-5, but also for violations of DR 5-101(A) and DR 5-104(A)). Petitioner further asserts that the relevant provisions of the *Code of Professional Responsibility* were enlarged by the amendments made in December, 1977, and therefore, he did not have notice that his conduct would result in disciplinary proceedings. He does not deny that he violated the Ethical Considerations as they read before the amendments, but says that they were not mandatory at that time. The fact that some provisions of the *Code of Professional Responsibility* were amended is totally irrelevant to this action. His violations were prohibited before as well as after the *Code* was amended.

The conduct now articulated as proscribed in EC 5-5 is a restatement of old Canon 9, *Canons of the American Bar Association. Cross-indexed to the Code of Responsibility, American Bar Association.* The footnotes from EC 5-5 and EC 5-6 also establish that this conduct has long been proscribed. The case of *In Re Jones,* 254 Or. 617, 462 P.2d 680 (1969) flatly states that this is conduct which an attorney need not be told is blatantly wrong. States which have ruled on the question prior to the time Respondent named himself beneficially unanimously condemned this practice. *In Re Moore,* 218 Or. 403, 345 P.2d 411 (1959); *In Re Kneeland,* 233 Or. 241, 377 P.2d 861 (1963);

Columbus Bar v. *Ramey,* 32 Ohio St.2d 91, 290 N.E.2d 831 (1972); *In Re Krotenburg,* 111 Ariz. 251, 527 P.2d 510 (1974); *Lantz* v. *State Bar of California,* 212 Cal. 213, 298 P. 497 (1931); *In Re McFarlane,* 10 Utah2d 217, 350 P.2d 631 (1960); *In Re Vilkomerson,* 270 App. Div. 166, 58 N.Y.S.2d 922 (1945); *In Re Anderson,* 287 N.E.2d 682 (Ill. 1972). See also the numerous cases cited at 98 *A.L.R.2d* 1234. These authorities establish:

(1) A reasonably informed attorney would be on notice that his conduct in drafting a will in which he is a named beneficiary will subject him to disciplinary action. This rule was well established by cases before Mr. Randall's conduct so his claim of lack of notice is without merit.

(2) The prohibition contained in EC 5-5 is based on the long and unhappy experience of the Bar in attempting to regulate situations fraught with potential for overreaching and abusing clients. EC 5-5 is merely the current articulation of a long-standing prohibition.

The Petitioner has cited the Preamble and Preliminary Statement of the *Iowa Code of Professional Responsibility for Lawyers.* It is readily apparent from the Iowa Supreme Court's decision in *Matter of Frerichs,* 238 N.W.2d 764 (1976) that the language in the preliminary statement is not controlling insofar as it might be read as Petitioner asserts. The Court stated:

> "Respondent seems to suggest the Ethical Considerations are not in all events binding on a lawyer but are merely aspirational . . .
>
> All lawyers practicing before this Court are bound by the Canons and the provisions of the Iowa Code above set out. They are not free to view them merely as aspirational. A Canon cannot be ignored by an attorney on the claim he believes conflicts with his view of a constitutionally protected right. The purpose of the Canons as explained by

the Ethical Considerations, Disciplinary Rules and adjudicated decisions is to show him the professionally acceptable route through questions or doubts he may have regarding such conflicts."

* * *

"The Ethical Considerations of our *Iowa Code of Professional Responsibility for Lawyers* (hereinafter I.C.P.R.L.) describe our common experience and prescribe the objectives for professional conduct. They constitute a body of principles upon which the lawyer can rely for guidance in many situations, including the one before us." 238 N.W.2d 764-766.

Petitioner's assertions that the Ethical Considerations and Disciplinary Rules are so vague and standardless that he was deprived of due process are clearly unfounded. The conduct, a large part of which were his violations of DR 5-101(A) and 5-104(A), for which Petitioner was disbarred was clearly prohibited at the time Petitioner drew Lovell Myers' will and represented Lovell Myers in the lawsuit in question.

CONCLUSION

For all reasons set forth herein, the Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

On May 19, 1978, The Committee on Professional Ethics and Conduct filed the following against John D. Randall:

COMPLAINT

COUNT I

COMES NOW the above-named Complainant and for its Complaint against the Respondent states:

1. That the Complainant, the Committee on Professional Ethics and Conduct of the Iowa State Bar Association whose chairman is John Gamble of Des Moines, Polk County, Iowa.

2. That the Respondent is an individual licensed to practice law in the various courts of this state and who resides at Cedar Rapids, Linn County, Iowa.

3. That sometime on or about March 14, 1973, the Respondent did consult with, as an attorney at law, Lovell Myers for the purported reason of preparing the Last Will and Testament for Lovell Myers.

4. That at such time the aforementioned Lovell did have substantial property and did have natural objects of his bounty, to wit: Marie Jensen, his daughter, and two grandchildren.

5. That thereafter the Respondent did, as an attorney at law, draft the will of Lovell Myers naming himself as sole beneficiary therein as well as the executor thereof; see Exhibit "A" attached hereto and by this reference incorporated herein.

6. That thereafter in the office of the Respondent and on March 14, 1973, the aforementioned Lovell Myers did publish and execute Exhibit "A" as his Last Will and Testament, the same being witnessed by Noreen K. Utecht, the secretary of the Respondent, and James C. Bennett, at that time a law associate of the Respondent.

7. That after Exhibit "A" was published and executed by Lovell Myers, the Respondent secured Exhibit "A" and placed it in the locked drawer in his desk in his office; Lovell Myers not receiving the original nor a copy thereof.

8. That there had prior to the publication and execution of Exhibit "A" existed an attorney-client relationship between the Respondent and Lovell Myers as well as joint ventures in certain business enterprises, the major one being Myers Farms, Inc. which owned approximately 2,500 acres of Iowa farm land as well as other assets.

9. That the aforementioned Lovell Myers did have, at least, a 50 percent interest in Myers Farms, Inc. with the Respondent owning the balance thereof.

10. That upon the death of the aforementioned Lovell Myers, the Respondent did file for probate, Exhibit "A", in the District Court of the State of Iowa in and for Linn County, the same being docketed as Probate No. P 3070-0276.

11. That upon the filing of the aforementioned Exhibit "A", as the Last Will and Testament of Lovell Myers, the Respondent secured orders admitting the same to probate and appointing himself as the executor of such estate.

12. That thereafter the Respondent did, initially, file a preliminary inheritance tax report or probate inventory stating, in substance, that the estate of Lovell Myers had no assets.

13. That thereafter Marie Jensen, daughter of the decedent, Lovell Myers, filed objections to the probate of Exhibit "A", alleging that the same was published and executed while Lovell Myers was under "undue influence" of the Respondent; subsequent amendments to the petition of Marie Jensen, basically alleged that Exhibit "A" was null and void as the Last Will and Testament of Lovell Myers because the same did give, devise, and bequeath all of his property ot the Respondent while the Respondent and Lovell Myers had a fiduciary relationship and

an attorney-client relationship at the time Exhibit "A" was published and executed.

14. That thereafter Marie Jensen withdrew or dismissed her petition and objections to the probate of Exhibit "A" upon settlement of the matter with the Respondent and the receipt or entitlement to receive from the Respondent a substantial consideration.

15. That the aforementioned actions and conduct of the Respondent constitutes such unprofessional and unethical conduct as to be in violation of DR1-102(A)(1), (3), (4), and (6); EC 1-5, EC 5-5, EC 5-6, and EC 9-6, *Iowa Code of Professional Responsibility for Lawyers* and Section 610.15 and 610.24, subsections (3) and (4), *Code of Iowa.*

16. That the aforementioned acts and violations of the *Iowa Code of Professional Responsibility for Lawyers* and *Code of Iowa,* jointly and severally, constitute such unprofessional and unethical conduct by the Respondent that necessary and appropriate disciplinary action should be taken against him.

WHEREFORE, the Complainant prays that this matter be set for hearing before a Division of the Grievance Commission of the Supreme Court of Iowa, and upon such hearing that the Division make the appropriate findings of fact, conclusions of law, and recommend that the Supreme Court of Iowa take the necessary and appropriate disciplinary action.

COUNT II

COMES NOW the above-named Complainant and for its further Complaint against the Respondent states:

1. That paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of Count I are hereby incorporated by reference.

2. That sometime prior to the Respondent's drafting of Exhibit "A" for Lovell Myers, a dispute arose between Lovell

Myers and the Respondent involving a Gilbert Morningstar and the manner in which Lovell Myers operated Myers Farms, Inc.

3. That the aforementioned dispute between the Respondent and Lovell Myers involved the personal interest as well as the financial interest of the Respondent; these interests were antagonistic to as well as being in conflict with the interest, personal and financial, of Lovell Myers.

4. That with the aforementioned knowledge the Respondent did thereafter draft Exhibit "A" for Lovell Myers and did further thereafter represent Lovell Myers in a lawsuit brought by Gilbert Morningstar as well as continued to represent Myers Farms, Inc. which included the interests of Lovell Myers.

5. That each and all of such acts by the Respondent are further violations of DR's 4-101(B)(2) and (3); EC 5-1, 5-2, and 5-3; and DR's 5-101(A) and 5-104(A), *Iowa Code of Professional Responsibility for Lawyers.*

6. That each and all of the aforementioned acts and cited violations of the *Iowa Code of Professional Responsibility for Lawyers* constitute such unethical and unprofessional conduct that disciplinary action against the Respondent should be taken.

WHEREFORE, Complainant prays as in Count I of its Complaint.

(Exhibit A, Last Will and Testament of Lovell Myers, appears on the following pages)

Last Will and Testament of
LOVELL MYERS

(Filed February 23, 1976)

Opened, publicly read & filed
February 23, 1976
KENNETH L. FERRY, JR.
Clerk of District Court

Carolyn M. Lindsey
Deputy

I, LOVELL MYERS, of the County of Linn, State of Iowa, being of sound mind and disposing memory make, publish and declare this instrument to be my Last Will and Testament and hereby revoke all former wills and codicils made by me.

ITEM I

I direct that the expenses of my last illness and funeral and all debts of every kind, nature and description be first paid by my executor hereinafter named. I have instructed my executor as to my wishes in relation to funeral arrangements and he will attend to carrying out my wishes.

ITEM II

Having been associated with John D. Randall, Sr., for many years and having accumulated property with him, it is my wish that upon my death, he shall have all of my property and I, therefore, give, devise and bequeath all of my property of every kind, nature and description wherever located to my friend, John D. Randall, Sr.

ITEM III

I nominate and appoint John D. Randall, Sr., Cedar Rapids, Iowa, as executor of this Will, and direct that no bond be required of him to secure the faithful performance of his duties as such executor.

IN WITNESS WHEREOF, I have subscribed this Last Will and Testament on this 14th day of March, 1973.

/s/ Lovell Myers

The above and foregoing instrument consisting of two typewritten pages, including the page on which this attestation clause appears, was at the date thereof signed, published and declared by the said Lovell Myers, therein named, to be his Last Will and Testament, in the presence of us and each of us who, at his request, in his presence and in the presence of each other have hereunto signed our names as witnesses on the day and year last above written, and we hereby certify that the above named testator was of sound and disposing mind and memory and more than twenty-two years of age.

WITNESSES

3717 12th Ave. SW
Cedar Rapids, Iowa — /s/ Noreen K. Utecht

1034 75th St. N.E.
Cedar Rapids, Iowa — /s/ James S. Bennett

APPENDIX B

On June 16, 1978, John D. Randall, filed the following:

ANSWER TO COMPLAINT

COMES NOW the Respondent in the above entitled cause and for Answer to the Complaint filed herein shows unto the Court:

COUNT I

1st. He admits paragraph 1.

2nd. He admits paragraph 2.

3rd. He denies paragraph 3.

4th. He denies paragraph 4.

5th. While he admits he drafted the Will of Lovell Myers and that Exhibit "A" is a copy thereof, he denies the balance of paragraph 5.

6th. He admits paragraph 6.

7th. He denies paragraph 7.

8th. That while he admits that an attorney-client relationship existed at one time prior to the drafting of Exhibit "A", he denies that at the time of the drafting of said Will there was any attorney-client relationship existing and further that there was any joint venture as alleged in paragraph 8.

9th. He admits paragraph 9.

10th. He admits paragraph 10.

11th. He admits paragraph 11.

12th. He denies paragraph 12.

13th. He admits paragraph 13.

14th. He admits paragraph 14.

15th. He denies paragraph 15.

16th. He denies paragraph 16.

WHEREFORE, this Respondent prays that Count I of the Complaint be dismissed.

COUNT II

1st. For answer to Count II, the Respondent incorporates the answer to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 the same as if fully rewritten herein.

2nd. That while the said Gilbert Morningstar was a subject of discussion between the Respondent and the said Lovell Myers, he denies there was any dispute involved, as alleged in Paragraph 2.

3rd. He denies paragraph 3.

4th. He denies paragraph 4.

5th. He denies paragraph 5.

6th. He denies paragraph 6.

WHEREFORE, Respondent prays that Count II of the Complaint be dismissed.

COUNT III

By way of a full and complete defense to the matters and things set forth in the Complaint in this cause, this Respondent shows:

1st. That the original Complaint filed herein by Marie Jensen was filed before the Ethics and Conduct Committee more than one year prior to the filing of the Complaint herein, and they

were advised on or about the 9th day of July, 1977, that the matters between the Respondent and the said Marie Jensen had been fully disposed of and settled and the case for the Will contest dismissed with prejudice.

2nd. That both the Professional Ethics and Conduct and the Grievance Committees have failed to promptly and expeditiously dispose of the Complaint aforesaid but have permitted the same to stand without action until on or about the 19th day of May, 1978, all of which had denied this Respondent of a speedy hearing and due process of law.

WHEREFORE, Respondent prays that the Complaint be dismissed.

APPENDIX C

On November 17, 1978, John D. Randall filed the following:

ANSWER TO ANSWER TO COMPLAINT

COMES NOW Respondent and amends his Answer to Complaint by adding the following:

COUNT I

First Defense

That Respondent at no time requested Lovell Myers to name him beneficially in his Will; nor did he suggest the same to Lovell Myers. Because of the long and close association between Lovell Myers and Respondent, exceptional circumstances, pursuant to EC 5-5, existed on March 14, 1973, with respect to Respondent's preparation of the subject Will at the direction of Lovell Myers.

Second Defense

That Respondent at no time requested Lovell Myers to name him executor of his Will; nor did he suggest the same to Lovell Myers. That Respondent was so named executor at the express direction of Lovell Myers.

Third Defense

That, pursuant to the Preamble and Preliminary Statement to the Iowa Code of Professional Responsibility for Lawyers, "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. . ." whereas "* * * Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character." That at the time subject Will was written, no Disciplinary Rule was in effect prohibiting the same, resulting in a total lack of

notice to Respondent that his actions could subject him to a disciplinary action, the same being a deprivation of due process.

Fourth Defense

That Respondent may not be subject to disciplinary action under the Code of Professional Responsibility in relation to circumstances referred to only in an Ethical Consideration and not in a Disciplinary Rule.

Fifth Defense

That the attorney for Complainant engaged in deception and misconduct depriving Respondent of procedural due process by coming to Respondent's office, discussing the complaint with Respondent, requesting information from Respondent, reviewing Respondent's books and files and generally representing himself as an investigator, when in fact, prior to that time, said attorney had drawn and finalized the Complaint against Respondent and had had it sworn to by the Chairman of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. Respondent was not informed in any way of said circumstances, warned of his rights, or advised that said attorney was acting as a prosecutor hunting evidence rather than as an investigator hunting information; and such actions on the part of Complainant warrant dismissal of the Complaint.

Sixth Defense

That the original intent of the language in EC 5-5 was not to prohibit the conduct which is the subject of the Complaint. Said EC 5-5 was derived from Code of Professional Responsibility of the American Bar Association which in turn relied, in part, on the work of Henry S. Drinker, Legal Ethics, 1953 Columbia University Press. In the preface to said ABA Code it is stated:

> "In our studies and meetings, we have relied heavily upon the monumental Legal Ethics (1953) of Henry S. Drinker, who served with great distinction for nine years as

Chairman of the Committee on Professional Ethics (known in his day as the Committee on Professional Ethics and Grievances) of the American Bar Association."

In such volume, Mr. Drinker states at page 94:

"A question is sometimes raised as to the propriety of a lawyer's inserting in the Will a legacy to himself. * * * This, of course, depends on the surrounding circumstances. If they are such that the lawyer might unreasonably be accused of using undue influence, he will be wise to have the provision inserted in a Codicil drawn by another lawyer. Where, however, a testator is entirely competent and the relation has been a long standing one, and where the suggestion originates in the testator, there is no necessity of having another lawyer in the case of a reasonable legacy. * * *

Seventh Defense

That the initial probate inventory filed in the Estate of Lovell Myers listed all the then known assets of the estate and the assigned values were reached after consultation with tax authorities who suggested the assignment of an arbitrary value, stated as such, until an actual value could be determined.

Eighth Defense

That the dismissal with prejudice filed by plaintiff in the Will contest case acts as an adjudication on the merits with respect to the allegations against Respondent and the same is res judicata as to complainant herein.

Ninth Defense

That Complainant's refusal to participate in discovery and in answer to Respondent's interrogatories, advised how it contended Respondent had violated certain statutes and rules, made it impossible for Respondent to become aware of the con-

tentions against him and to properly defend himself, violates Respondent's right to due process, and warrants dismissal of the complaint.

COUNT II

First Defense

Respondent repleads herein defenses one through nine of Count I by this reference.

Second Defense

That prior to March 14, 1973, the only dispute between Respondent and Lovell Myers involving Gilbert Morningstar was whether he should be terminated in his employment with Myers Farms, Inc., the same involving neither Respondent's personal or financial interests, or those of Lovell Myers.

Third Defense

That Respondent did enter his appearance on May 20, 1974, for Lovell Myers and Myers Farms, Inc., in a lawsuit filed on April 29, 1974, by Gilbert and Evelyn Morningstar against Respondent, Lovell Myers and Myers Farms, Inc. Respondent appeared for Lovell Myers in order to prevent his default and encouraged Myers to retain an attorney. Lovell Myers eventually retained attorney Richard Nazette. Respondent withdrew on December 9, 1975. The situation was fully explained to Lovell Myers, and no actions were taken on his behalf without his express consent following full disclosure. Further, no secret or confidence of Lovell Myers was used either to his disadvantage or to Respondent's advantage. That further, the interests of Myers Farms, Inc. in said litigation equally included the interests of Respondent and Lovell Myers.